was evidence of a rescission sufficient to justify a verdict for the plaintiff. *Schwartzreich v. Bauman-Basch Inc.* (1918, Sup. Ct. App. T.) 172 N. Y. Supp. 683.

This appears to be an ordinary case where an increase of salary is agreed upon before the end of the contract period. It is highly improbable that at any instant prior to execution of the second contract the defendant could have dismissed the plaintiff without having to pay damages or that the plaintiff was at liberty to refuse to work. The only change in the legal relations of the parties was that the defendant's duty to pay $90 per week was replaced by a duty to pay $100 per week. The court's willingness to permit the jury to indulge in the fiction of a total rescission shows that the plaintiff's counsel conceded too much when he conceded that "a promise by one party to do that which he is already under a legal obligation to perform is insufficient as a consideration." Such has, indeed, been stated to be the rule in *Vanderbilt v. Schreyer* (1883) 91 N. Y. 392 and other New York cases; but if the plaintiff had not himself threatened a breach of contract, a strong argument in his favor could be founded upon *DeCicco v. Schweizer* (1917, N. Y.) 117 N. E. 807. See Corbin, *Does a Pre-existing Duty Defeat Consideration?* (1918) 27 YALE LAW JOURNAL, 362. It is believed that the existing commercial and social *mores* do not justify the defendant in refusing to pay the new salary; and if so, it is certain that the courts will bring the law of consideration into harmony with the *mores,* as the court did in the principal case, by the use of fiction if necessary. The making of the new agreement can always be held to be evidence from which a rescission of the prior contract can be "implied"; the jury will do the rest.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—PRECEDENCE OF WAR ORDERS BY GOVERNMENT.—A buyer claimed damages for non-delivery of goods as per contract. The seller replied that it was prevented from delivering by reason of orders for goods given by the United States government for war purposes, these orders having precedence by Act of Congress. The contract contained an express provision as to strikes, accidents, and reasons beyond the seller's control. The government agents expressly demanded precedence for their orders, although this was done in an informal manner. *Held,* that the government order was not voluntarily sought by the seller and that the buyer was not entitled to damages for non-delivery. *Moore & Tierney v. Roxford Knitting Co.* (1918, N. D. N. Y.) 250 Fed. 278.

In a later case on similar facts it was found as a fact that the seller voluntarily sought the government contract and that the government agents had not demanded precedence in accordance with the Act of Congress until after the defendant had had ample time to perform its previous contract. *Held,* that the defendant had no excuse for non-performance. *Mawhinney v. Millbrook Woolen Mills* (1918, N. Y. Sup. Ct.) 172 N. Y. Supp. 461.

See COMMENTS, p. 399.

CONTRACTS—INCREASED EXPENSE DUE TO WAR—STRIKE, ACCIDENT, AND WAR CLAUSE.—In a contract for the manufacture and sale of "chamber acid" generally made from pyrites, it was provided that "war . . . or other uncontrollable causes rendering the sellers unable to deliver shall make this contract inoperative during the continuance of the difficulties." The war broke out later in Europe, and in 1917 the activity of the German submarines made it impossible to obtain a sufficient supply of pyrites. A better acid could be made from brimstone, which was obtainable, but the expense would have been

twice as great. The defendant began making acid from brimstone, and prorated its product among those customers who would pay an increased price. The plaintiff brought a bill for specific performance to compel delivery to him of acid made from brimstone, at the old contract price. *Held,* that the duty of the defendant was only to deliver acid made from pyrites and that there was no further duty in case pyrites could not be obtained by the exercise of reasonable diligence. *Davison Chemical Co. v. Baugh Chemical Co.* (1918, Md. App.) 104 Atl. 404.

See COMMENTS, p. 399.

CRIMINAL PROCEDURE—CONSTITUTIONAL LAW—VALIDITY OF STATUTE AUTHORIZING STATE TO APPEAL.—A state statute authorized an appeal by the state in criminal cases. A jury having acquitted the respondent of a charge of murder, the state appealed, alleging error in rulings on evidence. The respondent contended that the statute was unconstitutional. *Held,* that the statute was constitutional and, the exceptions being well taken, the state was entitled to a retrial. *State v. Felch* (1918, Vt.) 105 Atl. 23.

The constitution of Vermont does not contain the provision, so common in state constitutions, prohibiting "double jeopardy." It is of course well settled that the similar prohibition in the Fifth Amendment to the federal constitution is a limitation solely upon the powers of the United States government. *Ex parte Spies* (1887) 123 U. S. 131, 8 Sup. Ct. 21. The only federal constitutional provision which might be deemed applicable is the "due process" clause of the Fourteenth Amendment. The court in the principal case very properly held that the statute in question satisfied the tests of federal due process, inasmuch as it merely required the accused to submit to a new trial but not to a second punishment for the same offense. Apparently the federal Supreme Court has never passed upon the question directly. Where the Criminal Code of the District of Columbia gave the prosecution a "right of appeal" but added the proviso that "if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside" (Code D. C. sec. 935), the United States Supreme Court refused to pass upon errors committed where a verdict of acquittal had been rendered, on the ground that any determination made would not affect any case pending before the court and so would not be an exercise of judicial power. *United States v. Evans* (1909) 213 U. S. 297, 29 Sup. Ct. 507. Connecticut long ago by statute gave the state a right of appeal and it was upheld by the State Supreme Court, chiefly, however, on the ground that there is no "double jeopardy" involved in giving the state a right to a new trial even after a verdict of acquittal. *State v. Lee* (1894) 65 Conn. 265, 30 Atl. 1110. That was the view of Mr. Justice Holmes in his dissenting opinion in a case involving an interpretation of the prohibition against "double jeopardy" in a federal statute governing criminal procedure in the Philippines. *Kepner v. United States* (1903) 195 U. S. 100, 24 Sup. Ct. 797. That view is not, however, the prevailing one, as the opinion of the majority in the *Kepner* case shows. In the Connecticut case above cited, however, the question of federal due process was also raised, and passed upon adversely to the contention of the accused. The Vermont Bill of Rights provides: "Nor can any person be justly deprived of his liberty, except by the laws of the land." As a prohibition on legislative action this clause is at most equivalent to the "due process" clauses of other state constitutions. It therefore protects only the same "fundamental rights" that "due process" does. The right to be free from the vexation of a second trial where the first was erroneously conducted is certainly not one of these.